

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-536V

July 31, 2007

Not to be Published

JENNIFER VILLASENOR,

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Petitioner,

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v.

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Entitlement; alleged causation
of MS from Hepatitis B vaccine;
failure to file any records

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

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Respondent.

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Clifford J. Shoemaker, Vienna, VA, for petitioner.

Linda S. Renzi, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition dated July 29, 1999, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that hepatitis B vaccine caused an unspecified

¹ Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

adverse reaction. In almost 8 years, petitioner has never filed a single medical record either in the form of a CD or as a hard copy, much less an expert report. This case was included as part of the Omnibus proceeding concerning hepatitis B vaccine and demyelinating illnesses.

On March 8, 2007, in response to the undersigned's Order in the Omnibus cases, dated February 8, 2007, petitioner's counsel stated that he still did not have any records from petitioner. Petitioner's counsel asserted in that response that this is a case of multiple sclerosis (MS).

On April 10, 2007, the undersigned issued an Order directed to petitioner to show cause by June 1, 2007 why this case should not be dismissed.

On May 31, 2007, after petitioner orally moved for a one-month extension, the undersigned issued an Order granting an extension until July 2, 2007 for petitioner to show cause why this case should not be dismissed.

On July 2, 2007, petitioner filed a Status Report, stating that she wished to file a Motion for Judgment on the Record. Petitioner's counsel was waiting to receive petitioner's written permission to file for judgment on the record. The undersigned has received nothing more from petitioner. This case is overripe for dismissal for failure to prosecute.

DISCUSSION

To satisfy her burden of proving causation in fact, petitioner must offer "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." Althen v. Secretary of HHS, 418 F. 3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Secretary of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by “proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[,]” the logical sequence being supported by “reputable medical or scientific explanation[,]” *i.e.*, “evidence in the form of scientific studies or expert medical testimony[.]”

In Capizzano v. Secretary of HHS, 440 F.3d 1317, 1325 (Fed. Cir. 2006), the Federal Circuit said “we conclude that requiring either epidemiologic studies, rechallenge, the presence of pathological markers or genetic disposition, or general acceptance in the scientific or medical communities to establish a logical sequence of cause and effect is contrary to what we said in Althen....”

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, supra, at 1149. Mere temporal association is not sufficient to prove causation in fact. Hasler v. US, 718 F.2d 202, 205 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984).

Petitioner must show not only that but for the vaccine, she would not have had MS, but also that the vaccine was a substantial factor in bringing about her MS. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

In petitioner’s petition, petitioner’s counsel states, at paragraph 4:

While the records are not available and/or ready for filing, counsel affirms that he is in the process of obtaining the medical records to be filed. The reasons for this delay include the fact that counsel is in the process of filing numerous claims for vaccine injury before the August 6, 1999 deadline and is concerned about getting all claims filed in a timely fashion.

It is a long time since the August 6, 1999 deadline for filing these numerous claims and, yet, petitioner’s counsel could not have been forthright when he affirmed he was in the process of

obtaining the medical records to be filed since almost eight years have elapsed without petitioner's counsel filing a single one. On March 8, 2007, petitioner's counsel admitted that he still did not have any medical records from petitioner. The undersigned questions what kind of process petitioner's counsel was engaged in to obtain them, i.e., why petitioner's counsel sought petitioner's records from petitioner instead of from the medical doctors who treated her.

Since there is absolutely no proof in this case to support petitioner's allegations either in the form of medical records or medical expert opinion, petitioner has failed to make a prima facie case of proving that hepatitis B vaccine caused in fact her alleged MS.

CONCLUSION

Petitioner's petition is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.²

IT IS SO ORDERED.

July 31, 2007
DATE

s/Laura D. Millman
Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.